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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRUCE EDWIN CALLINS

Petitioner,

v.

JAMES A. COLLINS, Director
Texas Department of Criminal Justice
Institutional Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# *PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL QUESTIONS PRESENTED*

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**SUPPLEMENTAL QUESTIONS RAISED BY RESPONDENT'S BRIEF IN OPPOSITION**

1. (a) Does the claim raised in Petitioner's First Question Presented propose a "new rule" of criminal procedure under Teague V. Lane, 489 U.S. 288 (1989)?

   (b) If so, does Petitioner's proposed "new rule" fall within either of Teague's two exceptions?

2. Even if the above claim proposes a "new rule" under Teague and does not fall under either of Teague's two exceptions, should this Court modify its habeas corpus retroactivity doctrine so as to address the merits of this claim before discussing the retroactivity issue?



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**II. AT THE VERY LEAST, A CAPITAL SENTENCING JURY SHOULD BE REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT A CAPITAL DEFENDANT COMMITTED AN UNADJUDICATED EXTRANEOUS OFFENSE BEFORE CONSIDERING THAT OFFENSE IN AGGRAVATION OF PUNISHMENT.**

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**NO. 93-7054**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**BRUCE EDWIN CALLINS**

**Petitioner,**

**-v-**

**JAMES A. COLLINS, Director TDCJ-ID**

**Respondent.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Petitioner, **BRUCE EDWIN CALLINS,** submits this reply brief in response to the Respondent's Brief in Opposition. This reply brief is limited to the First Question Presented, which asks:

> **Is a Texas capital defendant's constitutional right to due process and equal protection of law violated by the State's introduction of evidence of the defendant's prior unadjudicated extraneous offenses during the capital sentencing phase when the jury is given no instructions on the burden of proof regarding those alleged acts of criminal conduct?[1]**

This reply brief also raises two additional questions presented that were not included in Mr. Callins' original certiorari petition and are being raised for the first time herein in response to Respondent's Brief in Opposition. Those supplemental questions

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[1] The wording of the First Question Presented in the original petition has been modified, but no change in the substance of the question has been made. In this Reply Brief, Petitioner limits his discussion to the due process component of the question presented.

concern the issue of whether Petitioner's First Question Presented proposes a "new rule" under Teague v. Lane, 489 U.S. 288 (1989). In addressing the claim raised in Petitioner's First Question Presented, the court of appeals reached the merits and did not discuss the retroactivity issue. See Callins v. Collins, 998 F.2d 269, 276-77 (5th Cir. 1993). Thus, Petitioner had no reason to address the Teague issue in his original petition. Accordingly, he properly does so in this reply brief in the form of a supplemental question presented. Petitioner also includes a related supplemental question presented that suggests a modification of this Court's habeas corpus retroactivity doctrine.



## LEGAL ARGUMENT

I.

**THE ISSUE OF WHETHER A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHTS ARE VIOLATED WHEN THE PROSECUTION INTRODUCES EVIDENCE OF THE DEFENDANT'S PRIOR UNADJUDICATED EXTRANEOUS OFFENSES DURING THE CAPITAL SENTENCING PHASE IS AN ISSUE THAT HAS DIVIDED OVER TWO DOZEN LOWER COURTS. ACCORDINGLY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS.**

The broader issue that petitioner's First Question Presented raises -- whether the Constitution permits the admission of extraneous unadjudicated offenses during the sentencing phase of a capital murder trial and, if so, under what circumstances -- has been one of the most recurring issues raised in capital cases nationwide during the last decade or so. This Court had denied certiorari in at least five cases in recent years in which this issue was raised, but only over sharp dissent.[2] The dissenters in those cases noted that there are "a number of conflicting court decisions nationwide" regarding the larger issue and that "the state courts are in considerable need of guidance." Williams, 484 U.S. at 936-37. The dissent in Williams cited conflicting decisions from nine state courts.

Petitioner's research has revealed that, as of early 1994, courts

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[2] See, e.g., Robertson v. California, 493 U.S. 879 (1989) (Marshall, J., dissenting from denial of certiorari, joined by Brennan, J.); Sharp v. Texas, 109 S. Ct. 190 (1989) (Marshall, J., dissenting from denial of certiorari); Miranda v. California, 486 U.S. 1038 (1988) (Marshall, J., dissenting from denial of certiorari, joined by Brennan, J.); Williams v. Lynaugh, 484 U.S. 935 (1987) (Marshall, J., dissenting from a denial of certiorari, joined by Brennan, J.); Devier v. Kemp, 484 U.S. 948 (1987) (Marshall J., dissenting from a denial of certiorari, joined by Brennan, J.).

in at least twenty-five states and three federal circuits[3] have considered the larger issue raised in this petition. See generally Stephen P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 63 COLUM. L. REV. 1249 (1993); Devier v. Zant, 3 F.3d 1445, 1467 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J.) (citing cases); United States v. Mergerson, 4 F.3d 337, 344-45 n.4 (5th Cir. 1993). Many of the decisions permitting unadjudicated extraneous offenses to be admitted during the capital sentencing phase have evoked dissents or concurring opinions questioning the propriety of the majority's holding. See, e.g., Devier v. Zant, 3 F.3d at 1466-68 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J., concurring); Paxton v. Oklahoma, ___ P.2d ___, 1993 Okla.Crim.App. LEXIS 64, at *64-66 (Okla.Crim.App. Dec. 30, 1993) (Chapel, J., dissenting). And although recognizing that it was bound by circuit precedent, at least one prior panel of the Fifth Circuit has questioned the validity of the Circuit's holding that unadjudicated extraneous offenses are admissible during the capital sentencing phase. See Laundry v. Lynaugh, 844 F.2d 1117, 1121 (5th Cir. 1988); see also Autry v. Estelle, 706 F.2d 1394, 1406 (5th Cir. 1983) ("When the effort is to prove that a defendant committed a particular crime on an earlier occasion, insisting in the capital case that such proof be only by a prior conviction may not be unreasonable.").[4] Needless

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[3] See, e.g., Ex Parte Cook, 369 So.2d 1251, 1257 (Ala. 1978); Miller v. State, 660 S.W.2d 163, 165 (Ark. 1983); People v. Heishman, 753 P.2d 629, 651 (Cal.), cert. denied, 488 U.S. 948 (1988); State v. Cohen, 1992 Del. Super. LEXIS 195 at *9 (Del. Super. 1992); Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); Fair v. State, 268 S.E.2d 316, 319-20 (Ga. 1980), cert. denied, 449 U.S. 104 (1981); People v. Devin, 444 N.E.2d 102 (Ill. 1982); State v. McCormick, 397 N.E.2d 276, 280 (Ind. 1979); State v. Brooks, 541 So.2d 801, 812-14 (La. 1989); Scott v. State, 465 A.2d 1126, 1135-36 (Md. 1983); State v. Petary, 781 S.W.2d 534 (Mo. 1989), vacated on other grounds, 110 S.Ct. 1800 (1990); State v. Reeves, 453 N.W.2d 359 (Neb. 1990), vacated on other grounds, 111 S.Ct. 425 (1990); State v. Noland, 320 S.E.2d 642, 654 (N.C. 1984), cert. denied, 468 U.S. 1230 (1985); Crump v. State, 716 P.2d 1387, 1388-89 (Nev.), cert. denied, 479 U.S. 871 (1986); State v. Glenn, 1990 Ohio App. LEXIS 4136 at *27-*29 (Ohio App. 1990); Paxton v. State, 1993 Okla.Crim.App. LEXIS 64, at *25 (Okla.Crim.App. Dec. 30, 1993); State v. Wagner, 752 P.2d 1136, 1175-76 (Ore. 1988), vacated on other grounds, 492 U.S. 914 (1989); Commonwealth v. Hoss, 283 A.2d 58, 69 (Pa. 1971); State v. Skipper, 328 S.E.2d-58, 62 (S.C. 1985), rev'd on other grounds, 476 U.S. 1 (1986); State v. Bobo, 727 S.W.2d 945, 952-53 (Tenn. 1987), cert. denied, 484 U.S. 872 (1987); Adanandus v. State, 866 S.W.2d 210 (Tex.Crim.App. 1993); State v. Taylor, 818 P.2d 1030, 1034-35 (Utah 1991), cert. denied, 112 S.Ct. 1576 (1992); Stockton v. Commonwealth, 402 S.E.2d 196, 206 (Va.), cert. denied, 112 S.Ct. 280 (1991); State v. Bartholomew, 683 P.2d 1079, 1082-86 (Wash. 1984). A twenty-sixth state court was recently squarely presented with the issue, but opted to reverse a death sentence on alternative grounds. A dissenting justice, however, noted the need to decide the issue. See State v. Sivak, 806 P.2d 413 (Idaho 1990) (Bistline, J., dissenting).

Judges on the federal Courts of Appeals are also in disagreement over the issue. In addition to the Fifth Circuit's decisions, *compare* Devier v. Zant, 3 F.3d 1445, 1465-66 (11th Cir. 1993) (unadjudicated extraneous offenses admissible during capital sentencing phase), *with* Coleman v. McCormick, 874 F.2d 1280, 1292 n.2 (9th Cir. 1989) (en banc) (Reinhart, J., concurring) (habeas petitioner's death sentence unconstitutional because it was based on unadjudicated offense) (see also Coleman v. Risley, 839 F.2d 434, 505-509 (9th Cir. 1988) (Reinhart, J., dissenting in panel decision that was reversed by en banc court)).

[4] The Fifth Circuit's holding in this case is curious. The court only implicitly (if at all) addressed Petitioner's argument that a specific "reasonable doubt" limiting instruction was required; the court treated Petitioner's claim as if he had only argued that evidence of unadjudicated extraneous offenses should be kept out entirely during the capital sentencing phase. See Callins, 998 F.2d at 276-77. Petitioner's pleadings filed in the federal district court and Fifth Circuit reveal that Petitioner specifically raised the discrete issue of whether a specific "reasonable doubt" limiting intruction was required.

to say, the lower courts are in need of a definitive resolution of this issue by this Court. As the Louisiana Supreme Court stated, the lower courts "are without firm guidance from the United States Supreme Court on the issue and the states are clearly divided in their approach." State v. Brooks, 541 So.2d 801, 812 (La. 1989).

The lower courts are evenly split three ways on the larger issue. Some states, like Texas, allow evidence of unadjudicated offenses to be admitted in a permissive fashion, imposing very little procedural restrictions on admission and, in particular, requiring no quantum of proof regarding jurors' ability to consider unadjudicated extraneous offenses in aggravation of punishment.[5] A second group allows such evidence to be admitted, but imposes strict procedural requirements on the admission of the evidence, most commonly requiring a special instruction to jurors that they must disregard the prosecution's evidence of an alleged unadjudicated crime if the State does not prove beyond a reasonable doubt that the defendant committed it.[6] The third group of states flatly proscribes the admission of evidence that a capital defendant committed an unadjudicated extraneous offense under any circumstances.[7]

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In another recent Texas capital habeas case raising the same issue, the Fifth Circuit summarily rejected the argument that a specific "reasonable doubt" limiting instruction is required during the sentencing phase, holding that "[W]e have rejected this claim in the past." Marquez v. Collins, ___ F.3d ___, 1994 U.S.App LEXIS 326, at * 18 (5th Cir. 1994), citing Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984). Milton does not hold what the Fifth Circuit claimed in Marquez. Rather, Milton simply held as a general matter that evidence of unadjudicated extraneous offenses is admissible during a Texas capital sentencing hearing. The court in Milton never discussed the "reasonable doubt" instruction issue. See Milton, 744 F.2d at 1097. Indeed, as the Fifth Circuit noted in a recent non-capital case, "[T]his court has never addressed th[e] precise issue" of whether a specific "reasonable doubt" limiting intruction is required regarding unadjudicated extraneous offenses introduced during the capital sentencing phase. United States v. Mergerson, 4 F.3d 337, 344-45 n.4 (5th Cir. 1993).

[5] See Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991); State v. Wagner, 752 P.2d 1136 (Or. 1988); Johnson v. State, 665 P.2d 815 (Okla. Crim. App. 1982); State v. Petary, 781 S.W.2d 534 (Mo. 1989); State v. Noland, 320 S.E.2d 642 (N.C. 1984). Texas has perhaps the most permissive approach, only requiring that the evidence be "relevant" to the "future dangerousness" inquiry contained in TEX. CODE CRIM. PRO. Art. 37.071(b) (Vernon 1989). See, e.g., Ramirez v. State, 815 S.W.2d 636, 653 (Tex.Crim.App. 1991) (citing cases).

[6] Five state courts have required that a specific instruction be given to the sentencing jury that it must find beyond a reasonable doubt that a capital defendant committed the unadjudicated offenses: People v. Heishman, 753 P.2d 629 (Cal. 1988); State v. Taylor, 818 P.2d 1030 (Utah 1990); State v. Reeves, 453 N.W.2d 359 (Neb. 1990); Miller v. State, 660 S.W.2d 163 (Ark. 1983); Fair v. State, 268 S.E.2d 316 (Ga. 1980). Cf. State v. Brooks, 541 So.2d 801 (La. 1989) (rather than specific "reasonable doubt" instruction, trial judge required to give "clear and convincing" instruction); State v. Cohen, 1992 Del. Super. LEXIS 195 (1992) (same); People v. Devin, 444 N.E.2d 102 (Ill. 1982) (death sentence reversed because jurors were not given specific "cautionary" instruction regarding admission of unadjudicated extraneous offenses). Two other states in other ways limit the jury's consideration of unadjudicated extraneous offense evidence. See Crump v. State, 716 P.2d 1387 (Nev. 1986); State v. Skipper, 328 S.E.2d 58 (S.C. 1985), rev'd on other grounds, 476 U.S. 1 (1986).

The Texas Court of Criminal Appeals has repeatedly refused to require a special instruction that a sentencing jury must find that a capital defendant committed an extraneous unadjudicated offense beyond a reasonable doubt. See, e.g., State v. Lewis, 815 S.W.2d 560, 566 (Tex.Crim.App. 1991). Nor does Texas even require that a jury find that a capital defendant committed all the elements of an extraneous offense such as rape. See Spence v. State, 795 S.W.2d 743, 758-59 (Tex.Crim.App. 1990).

[7] Eight state courts have held evidence of unadjudicated offenses may not, under any circumstances, be introduced during capital sentencing: State v. Glenn, 1990 Ohio App. LEXIS 4136 (Ohio App. 1990); State v. Bobo, 727 S.W.2d 945 (Tenn. 1987); Provence v. State, 337 So.2d 783 (Fla. 1976); Scott v. State, 465 A.2d 1126 (Md. 1983); Commonwealth v. Hoss, 283 A.2d 58 (Pa. 1971); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984); State v.

This Court last addressed the larger issue presented here in a case that is over four decades old. See Williams v. New York, 337 U.S. 241 (1949) (holding, *inter alia*, that evidence of unadjudicated extraneous offenses is admissible at capital sentencing hearing). A subsequent plurality decision of this Court, however, casts into serious doubt the continuing validity of Williams as applied to capital cases. See Gardner v. Florida, 430 U.S. 349, 355-60 (1977) (noting Williams decided before the Court recognized that: i) due process applies in full force at a capital sentencing hearing, and ii) the "death [penalty] is different" with respect to the degree of evidentiary reliability required during sentencing).

The law concerning the larger issue raised in this petition is obviously in a state of flux, and both the state and federal lower courts have reached irreconcilable decisions. For this reason alone, certiorari should be granted. See UNITED STATES SUPREME COURT RULE 10.1(a), (b).

II.

**AT THE VERY LEAST, A CAPITAL SENTENCING JURY SHOULD BE REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT A CAPITAL DEFENDANT COMMITTED AN UNADJUDICATED EXTRANEOUS OFFENSE BEFORE CONSIDERING THAT OFFENSE IN AGGRAVATION OF PUNISHMENT.**

Petitioner's argument is quite modest. He does not contend that the admission of unadjudicated extraneous offenses during the capital sentencing phase in itself violates the Eighth and Fourteenth

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McCormick, 397 N.E.2d 276 (Ind. 1979); Cook v. State, 369 So.2d 1251 (Ala. 1979).



Amendments. Rather, he argues that, if such aggravating evidence is to be introduced, it should be done in a manner that *promotes reliability and avoids undue prejudice*. See Stringer v. Black, 112 S. Ct. 1130 (1992); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); see also Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (in discussing Georgia's "wide scope of evidence" permitted at capital sentencing hearings, the Court stated that "[s]o long as the evidence introduced at ... the pre-sentence hearing *do[es] not prejudice a defendant*, it is preferable not to impose restrictions" on the wide scope of admissible evidence) (emphasis added); cf. Johnson v. Mississippi, 486 U.S. 578 (1988).

At petitioner's capital sentencing hearing, his jury did not simply rationally weigh mitigation evidence against aggravation evidence, as numerous decisions of this Court have contemplated. Rather, petitioner's sentencing hearing was a series of "trials-within-a-trial," United States v. McNatt, 931 F.2d 251, 256 (4th Cir. 1991). Trial counsel were required not only to concern themselves with the presentation of mitigating evidence, but also to defend against the deluge of evidence of unadjudicated extraneous offenses offered by the State.[8] At the very least, the State should have been required to prove the unadjudicated extraneous offenses beyond a

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[8] In this way, the Sixth Amendment's guarantee of effective assistance of counsel is also implicated. See Mempa v. Rhay, 389 U.S. 128 (1967) (right to effective assistance of counsel fully applies to sentencing hearing).

reasonable doubt.[9]

While one could argue that competent trial counsel should in theory be able to preclude undue prejudice caused by unreliable allegations by State's witnesses simply by employing the traditional processes of the adversary system, cf. Barefoot v. Estelle, 463 U.S 880, 901 (1983) ("We are unconvinced ... that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence ...."), such a facile assumption ignores reality in this particular context. The simple truth is that no trial counsel can reasonably be expected to adequately defend against a multitude of major felonies adjudicated at one fell swoop, particularly when there is no quantum of proof governing the unadjudicated crimes.

At the very minimum, the only way to promote reliability is to require a specific limiting instruction that requires sentencing jurors to find beyond a reasonable doubt that unadjudicated extraneous offenses in fact occurred. As Eleventh Circuit Judge Kravitch argued in a recent concurring opinion addressing this very question:

> Assertions by the State at a capital sentencing hearing that the defendant committed crimes for which

[9] The Texas Court of Criminal Appeals has reasoned that no such "reasonable doubt" instruction is necessary because TEX. CODE CRIM. PRO. Art. 37.071 requires that jurors be instructed that they must find "beyond a reasonable doubt" that there is a "probability" that a defendant poses a future threat to society. See Lewis v. State, 815 S.W.2d 560, 566-67 (Tex.Crim.App. 1991). This logic is faulty. The Texas court has ignored that jurors may not believe beyond a reasonable doubt that an extraneous offense or offenses actually occurred, but nonetheless will consider such accusations in prognosticating future dangerousness. Indeed, the more flimsy accusations offered by the prosecution, the greater likelihood that jurors will "stack" lesser quantums of proof in order to make the decision that a defendant poses a future danger.



> was has not been convicted are inherently suspect. ... On the other hand, the State has an important interest in presenting to the sentencing jury all relevant evidence regarding the defendant's character. ... The American justice system typically balances these competing concerns by requiring the State to present evidence sufficient to satisfy an applicable standard of proof and the court to instruct the jury as to that standard. ... Just as it is necessary to instruct the jury as to the standard by which the State must prove the elements of the primary crime [i.e., by proof beyond a reasonable doubt] in order to guarantee a fundamentally fair guilt-innocence proceeding, so too the jury must be instructed as to the standard by which a State must prove unadjudicated criminal conduct to be used as a[n] ... aggravating circumstance in order to guarantee a fundamentally fair sentencing proceeding.

Devier v. Zant, 3 F.3d 1445, 1467 (11th Cir. 1993) (Kravitch, J., concurring, joined by Clark, S.J.).

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 365 (1970). This constitutional requirement goes to the degree of reliability and accuracy that our criminal system requires in order to stigmatize an act as "criminal." "The accused during a criminal prosecution has at stake an interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." Id. at 362-64. Obviously such considerations apply *a fortiori* when life is at stake, rather than merely one's liberty or reputation. Under Texas' present capital sentencing scheme, conduct that qualifies as a "criminal act of violence"[10] may

[10] TEX. CODE CRIM. PRO. Art. 37.071(b)(2) (Vernon 1989).

be introduced against the defendant, even though there has been no prior formal adjudicatory determination of guilt beyond a reasonable doubt. Nor does Texas procedure require either a specific reasonable doubt instruction given at the punishment stage regarding any unadjudicated extraneous offenses, or even that jurors find that all the elements of a unadjudicated extraneous felony were committed by the defendant. Spence v. State, 795 S.W.2d 743, 759 (Tex.Crim.App. 1990) ("There is . . . no requirement in our law that all of the statutory elements of an offense must be proven before a prior unadjudicated extraneous offense may be admitted at the punishment phase of a capital murder trial.").[11]

A specific "reasonable doubt" limiting instruction is also required under this Court's reasoning in McMillian v. Pennsylvania, 477 U.S. 79 (1986). In McMillian, this Court held that, in certain situations, a sentencing fact found during a punishment phase of a criminal trial could be a "tail which wags the dog of the substantive offense" in the sense that criminal punishment drastically increases upon finding of such a pivotal sentencing fact. McMillian, 477 U.S. at 87-88. In such a case, the Court held, a finding of the fact beyond a reasonable doubt may be required in order to satisfy the due

[11] Remarkably unreliable evidence of unadjudicated extraneous offenses is regularly introduced during Texas capital sentencing hearings. See, e.g., Rodriguez v. State, 597 S.W.2d 917 (Tex.Crim.App. 1979) (Phillips, J., dissenting, joined by Roberts & Clinton, JJ.) (hearsay-within-hearsay); Farris v. State, 819 S.W.2d 490, 507 (Tex.Crim.App. 1990) (uncorroborated accomplice accusations); Thompson v. State, 691 S.W.2d 627, 632 (Tex.Crim.App. 1984) (same); Mitchell v. State, 650 S.W.2d 801, 812 (Tex.Crim.App. 1983) (same). Because jurors are given no "reasonable doubt" limiting instructions, jurors presumably consider such tenuous evidence in assessing punishment.



process clause. See id.; see also United States Mergerson, 4 F.3d 337, 344-45 (5th Cir. 1993). In a post-Furman Texas capital sentencing phase, evidence of unadjudicated extraneous offenses have frequently been the "tail that wags the dog of the substantive offense" and caused jurors to vote for a death sentence rather than a life sentence. See Stephen P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials*, 93 COLUM L. REV. 1249 (1993) (discussing a typical Texas capital case).

Also notable in this regard are the many non-capital cases in which federal courts applying the Sentencing Guidelines have required a "clear and convincing" quantum of proof when the penalty differential resulting from the judge's consideration of a particular unadjudicated extraneous offense would be an especially large one. See, e.g., United States v. Mergerson, 4 F.3d 337, 343 (5th Cir. 1993) ("We recognize a growing number of cases decided by courts in other circuits in which a higher standard of proof has been suggested or required when a finding of a particular fact relevant to sentencing dramatically increases the sentencing options of the court to the disadvantage of the defendant."); United States v. Kikumura, 918 F.2d 1084, 1101-1102 (3d Cir. 1990). Routine sentencing hearings under the federal guidelines are governed by a preponderance standard, see, e.g., United States v. Wright, 873 F.2d 437, 441 (4th Cir. 1989), a minimal standard of proof which Texas does not even require regarding unadjudicated extraneous offenses in the capital sentencing context. Former Justice White recently dissented from a denial of certiorari in

a case in which the petitioner suggested that the quantum of proof required in non-capital sentencing should be "clear and convincing." See Kinder v. United States, 112 S. Ct. 2290 (1992) (White, J., dissenting from denial of certiorari).

If certain non-capital sentencing hearings require a heightened quantum of proof, all capital sentencing hearings should require such. Requiring a higher quantum of proof is eminently reasonable at a capital sentencing hearing according to the logic in non-capital cases like Kikumura, 918 F.2d at 1100-01 ("[W]e are dealing with findings that would increase Kikumura's sentence from about thirty months to thirty *years* ... . This is perhaps the most dramatic example imaginable at a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense'" (citation omitted).) The penalty differential between a life prison sentence and the death penalty is a difference in kind and not merely in degree. As was so correctly noted in Woodson, "[d]eath in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). At the very least, this Court should require Texas to alter its prevailing sentencing procedure and require a specific reasonable doubt instruction regarding extraneous unadjudicated offenses.

III.

**PETITIONER'S FIRST QUESTION PRESENTED IS NOT BARRED BY TEAGUE.**

In its Brief in Opposition to Mr. Callins' certiorari petition, the State argues that the claim raised in Petitioner's First Question



Presented "would require the adoption of a new rule in a case on collateral review, in violation of Teague v. Lane, 489 U.S. 288 (1989)." Respondent's Brief in Opposition, at 11. As noted above, the court of appeals did not invoke Teague and instead addressed the merits of the claim.

The claim raised in the First Question Presented does not propose a "new rule" within the meaning of Teague. Rather, the claim is dictated by a number of this Court's decisions, including In re Winship, 397 U.S. 358 (1970); McMillian v. Pennsylvania, 477 U.S. 79 (1986); and Gardner v. Florida, 430 U.S. 349 (1977). (See supra discussion.) The simple fact that Petitioner's claim would require this Court to overrule a great deal of lower court precedent to the contrary does not mean that the claim *ipso facto* proposes a "new rule." Cf. Stringer v. Black, 112 S. Ct. 1130 (1992).

Furthermore, even assuming that the claim raised in Petitioner's First Question Presented were a "new rule," the claim would nevertheless be cognizable in federal habeas corpus because it qualifies under both of Teague's two exceptions. In Teague, this Court recognized two exceptions to the application of Teague's non-retroactivity bar for "new rules": First, a claim is not barred if the rule it proposes if it places certain kinds of primary, private conduct beyond the power of the law-making authority to proscribe; and second, a claim is not barred if it proposes a "bedrock" rule of criminal procedure. See Teague, 489 U.S. at 310-12; see also Penry v. Lynaugh, 492 U.S. 302 (1989).

Petitioner meets the first exception because in this case the

State of Texas sentenced Petitioner to death in large part based on conduct that the State was not permitted to punish unless a jury found beyond a reasonable doubt that Petitioner in fact engaged in such conduct. The first exception to Teague applies because Petitioner's unadjudicated extraneous conduct was not "criminal" under the due process clause *unless and until* it was found beyond a reasonable doubt, which it was not. Cf. Beam v. Paskett, 3 F.3d 1301, 1310-11 (9th Cir. 1993) (discussing Teague's first exception). "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J.).

Petitioner also meets Teague's second exception. His claim is primarily rooted in the constitutional principle announced in In re Winship, 397 U.S. 358 (1970). In that case, the Court stated that the "reasonable doubt" quantum of proof "plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that *bedrock* 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" Id. at 363 (emphasis added). The "bedrock" nature of the "reasonable doubt" quantum of proof was also recently recognized in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), in which the Court held that jury instructions that erroneously define "reasonable doubt" are not subject to harmless-error analysis.



IV.

**ASSUMING THAT THIS COURT BELIEVES THAT TEAGUE BARS PETITIONER FROM RAISING THE ABOVE CLAIM IN FEDERAL HABEAS CORPUS, THIS COURT SHOULD NEVERTHELESS ADDRESS THE MERITS OF THIS IMPORTANT CLAIM.**

**A. This Court should modify its retroactivity analysis under Teague v. Lane so that a federal habeas court has the discretion first to consider the merits of a claim before deciding whether it constitutes a "new rule."**

In Teague v. Lane, 489 U.S. 288 (1989), a plurality of this Court adopted a retroactivity doctrine governing "new rules" of constitutional law announced on federal habeas corpus. After Teague, federal habeas courts may not afford relief to habeas petitioners who raise claims proposing "new rules" unless such rules fall under either of two narrow exceptions to the general rule of non-retroactivity on federal habeas review. Id. at 305-11. Teague's approach to retroactivity of new rules has since been adopted by a majority of the Court. See, e.g., Sawyer v. Smith, 110 S. Ct. 2822 (1990).

Petitioner wishes to address only one aspect of the Teague doctrine: Teague's requirement that federal habeas courts, when confronted with claims appearing to propose new rules, should, as a threshold matter, determine whether the claims in fact propose new rules. If indeed the claims propose new rules, Teague instructs courts to avoid addressing the merits of such claims. See Penry v. Lynaugh, 109 S. Ct. 2934, 2944, 2952 (1989); Sawyer, 110 S. Ct. at 2827. For the reasons stated below, Petitioner proposes that this Court use his case as a vehicle to modify this particular aspect of the Teague doctrine. Petitioner contends that federal habeas courts

(including this Court) that are presented with claims proposing "new rules" should have the discretion, as a threshold matter, to address the merits of a claim and thereafter decide whether the claim is a new rule that cannot be applied to the habeas petitioner before the court. Petitioner believes that the interests of all parties -- criminal defendants, the states, and the state and federal courts -- would benefit if the Court adopts Petitioner's proposal.

At least four members of the Court at the time that Teague was decided believed that federal habeas courts should first address the merits of issues and, only then, decide whether the claims propose "new rules." See Teague, 489 U.S. at 345 (Brennan, J., dissenting, joined by Marshall, J.); Penry, 109 S. Ct. at 2963 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). A fifth member of the modern Court has also suggested that this Court should reach the merits before deciding whether the claim is a new rule. See Wright v. West, 112 S. Ct. 2482, 2499 (1992) ("Although as a general matter 'new rules will not be applied or announced' in habeas proceedings, . . . there is no requirement that we engage in the threshold Teague inquiry in a case in which it is clear that prisoner would not be entitled to the relief he seeks even if his case were pending on direct review.").[12] Furthermore, in a recent habeas

[12] Although Justice Kennedy's suggestion appears to be limited to cases where a federal habeas court *rejects* the habeas petitioner's claim on the merits, the effort expended by a habeas court in deciding whether a claim lacks merit would be the same effort expended in determining whether the claim possesses merit. Indeed, unless the claim patently lacks merit, a court will not know whether the claim possesses merit or lacks merit until after expending the effort to research and deliberate the claim in the first place.



case in which the Court applied Teague, five members of the Court appeared to "reach out to decide the merits of the [new] rule" before applying Teague. Gilmore v. Taylor, 113 S. Ct. 2112, 2120 (1993) (O'Connor, J., concurring, joined by White, J.). Finally, the leading scholar on federal habeas corpus has listed "seven reasons why the proper order of decision ought to be, first, the question of whether a proposed new rule of law is constitutionally compelled, [and] second (in the same case), whether any rule adopted is retroactive . . . . " James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-41 (1991 Supplement).

Thus, this Court's adoption of Petitioner's proposal would hardly be a radical departure from the status quo or from sound judicial logic or policy. Because Teague is not a jurisdictional doctrine, see Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990), this Court may modify it as easily as it created it. See Teague, 489 U.S. at 300 (Teague doctrine first proposed by amicus curiae brief; Court raised issue *sua sponte*). Furthermore, as discussed below, Petitioner's proposed modification of the Teague doctrine would not run afoul of Article III's proscription against "advisory opinions."

**i. Teague unduly "freezes" the development of constitutional law.**

The most widespread criticism of the Teague doctrine is that it

In the wake of Teague, at least one lower court questioned whether Teague should prohibit a federal habeas court from reaching the merits before deciding the retroactivity issue. See Sawyer v. Butler, 881 F.2d 1273, 1280 (5th Cir. 1989) (en banc); see also Arkin, *The Prisoner's Dilemma: Life in the Lower Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 395-99 (1991).

"freezes" or "stunts" the development of federal constitutional rules of criminal law and procedure. See, e.g., Teague v. Lane, 489 U.S. at 338-39 (Brennan, J., dissenting, joined by Marshall, J.) (observing that Teague prevents "the opportunity . . . to further the evolution of [this Court's] thinking" regarding many areas of constitutional law and that "[p]ermitting the federal habeas courts to decide novel habeas claims . . . has profited our society"); Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735, 1797-98 & n.355 (1991) ("By restricting the opportunity for judges to address novel claims, [Teague] thus tend[s] to freeze the development of constitutional law."); Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 185, 191 (1989) ("Teague 'freezes' the federal law applicable to a [habeas] petitioner" and "deprive[s] the lower federal courts of most of their opportunities to make 'new law' in federal habeas cases."); Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 49 n. 164 (1989) (Teague "places significant limits on the power of a federal habeas corpus court to articulate new constitutional law.").[13]

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[13] See also Judge Donald Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1013, 1043 (1993); Lewis & Blumoff, *Reshaping Section 1983's Asymmetry*, 104 U. PA. L. REV. 755, 780 (1992); Althouse, Tapping the State Court Resource, 44 Vand. L. Rev. 953, 990 (1991); Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 179 (1991); Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 372 (1991); Chief Judge Gilbert Merritt, *Access to the Federal Courts in Habeas Corpus Cases*, 58 TENN. L. REV. 145, 146 (1990); *Recent*



This criticism is well-placed. If federal habeas corpus courts cannot decide the merits of claims proposing "new rules," the *only* federal court that may address the merits of such claims is *this Court* on direct review. Of course, as this Court is well aware, its overburdened certiorari docket cannot possibly address all meritorious constitutional claims raised on direct appeal from state criminal courts. Cf. Strauss, *One Hundred and Fifty Cases a Year: Some Implications of the Supreme Court's Limited Resources For Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). During 1992, for example, this Court was presented with hundreds of certiorari petitions from state court criminal defendants on direct appeal, yet this Court granted certiorari and issued opinions after briefing and oral argument in *only seven cases*.[14] As Members of this Court have

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*Developments: The Court Declines in Fairness -- Teague v. Lane*, 109 S. Ct. 1060, 25 HARV. C.R.--C.L. L. REV. 164, 182 (1990); Friedman, *Legal Theory: A Different Dialogue*, 85 NW. U. L. REV. 1, 13 (1990).

[14] See Espinosa v. Florida, 112 S. Ct. 2926 (June 29, 1992); Medina v. California, 112 S. Ct. 2572 (June 22, 1992); Morgan v. Illinois, 112 S. Ct. 2222 (June 15, 1992); Sochor v. Florida, 112 S. Ct. 2114 (June 8, 1992); Riggins v. Nevada, 112 S. Ct. 1810 (May 18, 1992); Dawson v. Delaware, 112 S. Ct. 1093 (March 9, 1992); White v. Illinois, 112 S. Ct. 736 (January 15, 1992). This Court also granted certiorari and issued an opinion in Trevino v. Texas, 112 S. Ct. 1547 (April 6, 1992) (per curiam); however, that case was a summary disposition. This Court also granted certiorari and issued an opinion in Georgia v. McCollum, 112 S. Ct. 2348 (June 18, 1992); however, the State, not the defendant, was the petitioner in that case.

Although appeals from federal criminal cases offer an additional opportunity to develop the law, as this Court is well aware, the great bulk of criminal proceedings occur in state courts. See Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 116, 179 & n.313 (1991) (12 million state criminal cases per year versus less than 44,000 in federal court). Furthermore, in terms of capital cases, only a handful have been

repeatedly noted over the past few decades, certiorari is a haphazardous means of reviewing constitutional claims.

Clearly meritorious claims are frequently denied certiorari for any number of reasons that have nothing to do with whether a claim raised has merit or not. See Darr v. Burford, 339 U.S. 200, 220-29 (1951) (Frankfurter, J., dissenting); see also Teague v. Lane, 489 U.S. at 296 ("As we have often stated, the denial of a writ of certiorari imports no expression on opinion upon the merits of the case.'") (citing cases). Although Members of this Court have attempted to be prescient about Teague's operation on federal habeas review in judging whether to grant certiorari, see, e.g., Spencer v. Georgia, 111 S.Ct. 2276 (1991) (Kennedy, J., dissenting from denial of certiorari) ("This case presents important questions of federal law, and if I thought that our decision in Teague v. Lane . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari."), such prognosticating -- without the benefit of briefing and plenary consideration -- cannot always be accurate.

Because Petitioner's proposal would permit federal habeas courts to decide the merits of claims purporting to propose a new rule before addressing whether habeas petitioners may benefit from such claims, this major criticism of Teague would no longer exist.

**ii. Nothing in Petitioner's proposal is contrary to the underlying federalism concerns of Teague.**

Teague, like numerous other decisions by this Court regarding its

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prosecuted in federal court in the modern era. Of the seven direct appeal cases noted above, all were capital save White.



modern habeas jurisprudence,[15] was concerned with federalism and finality -- in preventing state court criminal convictions from being unnecessarily upset by a federal habeas court. See Teague, 489 U.S. at 306-10. Those concerns in the context of federal habeas retroactivity doctrine compelled this Court to fashion a rule whereby a state court conviction should not be upset so long as it is based on a "good faith," objectively "reasonable" interpretation of existing constitutional law at the time the habeas petitioner's conviction became final. See Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993).

Petitioner's proposal would not frustrate the concerns of federalism and finality because a habeas petitioner's conviction or sentence would not be upset if a federal habeas court were to make a threshold ruling on the merits of the petitioner's claim before ultimately denying habeas relief on the grounds that the claim proposed a "new rule." Petitioner's proposal instead offers the best of both worlds. It respects federalism and finality and, at the same time, permits federal habeas courts to fulfill their "independent obligation to say what the law is" on habeas corpus irrespective of what a state court has held. Wright v. West, 112 S. Ct. 2482, 2497 (1992), (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.).

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[15] See, e.g., Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring); Stone v. Powell, 428 U.S. 465 (1976); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality); Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); McCleskey v. Zant, 111 S.Ct. 1454 (1991); Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992); Graham v. Collins, 113 S. Ct. 892 (1993); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993).

**B. An analysis of retroactivity under the law of remedies supports Petitioner's proposal.**

**i. The framework offered by Professors Fallon and Meltzer**

In an insightful article written by Harvard Law Professors Richard H. Fallon, Jr., and Daniel J. Meltzer, the authors explain why this Court's Teague doctrine errs by treating the retroactivity question as a threshold issue that, if decided adversely to a habeas petitioner, would preclude courts from reaching the merits of claims. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).[16]

In short, Professors Fallon and Meltzer propose that:

> [Retroactivity] issues involving the relevance of novelty and unpredictability [in constitutional law] are best understood as addressing a question within the law of remedies: when should standard remedies be withheld in light of a rule or decision's relative unpredictability? Attempts to frame "nonretroactivity" issues exclusively in terms of changes in substantive law lead to a tangle of confusions. Whether there should be a refund remedy for the collection of unconstitutional taxes is clearly a remedial question, as is whether government officials should be liable in damages for their constitutional torts. *But habeas corpus petitions and even criminal [direct] appeals raise similar issues: the constitutional violation occurred in the past, and the question for decision is whether a habeas or appellate court should give a remedy.*

Id. at 1736 (emphasis added); see also id. at 1764-1820.

Applying this larger theory to this Court's Teague doctrine,

[16] Members of this Court have previously cited this article with approval. See Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2537 (1993) (O'Connor, J., dissenting, joined by Scalia, J.).



Professors Fallon and Meltzer argue that, in approaching the retroactivity question under the law of remedies, federal habeas courts could properly rule on the merits of a claim as a threshold matter and, only then, address the retroactivity issue. See id. at 1813-20. Importantly, Professors Fallon and Meltzer do not suggest that federal habeas courts should be *required* in every case to address the merits of a claim that proposes a new rule. Instead, courts should exercise discretion in determining when addressing the merits would be appropriate:

> Some cases, involving important and recurring questions of law, will present particularly strong arguments for reaching the merits. In others, in which the new issue is fact-bound, or obscurely presented and therefore complicated to resolve, the interest in prompt dispute resolution may predominate and call for dismissal before the court reached the merits. It is difficult, however, to imagine all the variables that might appropriately bear on a judicial choice concerning the order in which to address the merits even though relief would be denied in any event.

Id. at 1817-18.

As Professors Fallon and Meltzer point out, this approach would hardly be path-breaking: in analogous areas, this Court's constitutional jurisprudence permits a court to address the merits of a claim but still deny relief under the remedial doctrine. This Court's harmless error doctrine is the leading example. See id. at 1771-72, 1799; see also Chapman v. California, 386 U.S. 18 (1967); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). Other examples include habeas or criminal cases in which a court finds a procedural default or an abuse of the writ yet nevertheless, in the alternative, proceeds

to address the merits of a claim.[17] The "good faith" exception to the Fourth Amendment exclusionary rule is yet another example. See United States v. Leon, 468 U.S. 897 (1984). See also James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-40 (1991 Supplement).

This proposal has obvious appeal: it permits federal courts to develop new law in appropriate cases and, at the same time, is perfectly in accord with this Court's joint concerns with federalism and finality that have dominated its modern habeas corpus jurisprudence. The proposal would in no way affect any other aspect of this Court's constitutional or habeas corpus jurisprudence.[18]

**ii. Petitioner's proposal would not violate Article III's proscription against "advisory opinions."**

One possible objection foreseen by Professors Fallon and Meltzer is that this proposal would violate Article III's proscription against "advisory opinions" and, in a related vein, that a habeas court reaching the merits of a claim and then denying relief because the

[17] See, e.g., Russell v. Collins, 944 F.2d 202, 204 n.1, 206 (5th Cir. 1991) (finding successive habeas petitioner's claims abused yet addressing merits in the alternative); Lindsey v. Smith, 820 F.2d 1137, 1144-45 (11th Cir. 1987) ("[A]ssuming *arguendo* that appellant is not procedurally barred from asserting these claims, . . . we conclude that appellant has not demonstrated on the merits of these or any of his claims that he is entitled to habeas relief.").

[18] In particular, the retroactivity doctrine announced in Griffith v. Kentucky, 479 U.S. 314 (1987), which holds that "new rules" announced on direct appeal must be applied to all defendants whose convictions are not final, would not be subject to this proposal, since Griffith is rooted in constitutional principles -- treating similarly situated persons in a like manner.



claim proposes a new rule would be impermissibly "legislating." Professors Fallon and Meltzer reject these objections:

> The view that non-retroactivity doctrines are impermissibly legislative tends to weave together three strands of argument. The first holds that the power of judicial review, although limited, is obligatory. An Article III court with jurisdiction of a "case or controversy" therefore has no choice but to decide the merits and, if the claimant prevails, to award a remedy. Although the premise of this argument may be valid, the conclusion does not follow. As we have argued above, a court must apply the relevant law, but the relevant law includes the law of remedies, under which it may be appropriate to deny relief even when a violation has been found.
>
> At this point, critics of non-retroactivity suggest that article III supports a second objection. Marbury v. Madison [5 U.S. 137 (1803),] grounds the power of judicial review in the need to decide cases or controversies; as a result, federal courts may decide constitutional questions only when necessary to determine a litigant's right to relief. When remedies will be withheld in any event, a constitutional pronouncement will not affect the disposition and is thus said to constitute a forbidden "advisory opinion." The central assumptions of this second argument resonate with a powerful theme in the lore of Article III. But that theme is only one aspect of a complex tradition. Notwithstanding the contrary implications in . . . Teague, the argument that federal courts should decide constitutional questions only as a matter of strict necessity cannot be reconciled with a variety of established doctrines.

Fallon & Meltzer, New Law, supra, at 1798-1801; see also James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 22A.1, at 138-39 (1991 Supplement).

In this regard, it is noteworthy that this Court has also repeatedly recognized the "pure prospectivity" -- the possibility that certain "new rules" will only be applied to all litigants after the announcement of the decision is rendered, thus denying application of the rule even to the parties before the court. See, e.g., James Beam

Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443-44 (1991); but cf. Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2527 (1993) (O'Connor, J., dissenting, joined by Scalia, J.). As the Court stated in Linkletter v. Walker, 381 U.S. 618, 621-22 & n.3 (1965), "[i]t has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . . However, no doubt was expressed of our power under Article III in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)." As California Supreme Court Justice Roger Traynor noted in his seminal article on retroactivity, such "pure prospectivity" rulings are not mere dicta. See Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 560 (1977).

**C. This Court's qualified immunity jurisprudence supports Petitioner's proposal by analogy.**

As discussed supra, the rationale of this Court's Teague retroactivity doctrine is jurisprudentially equivalent to this Court's rationale for its qualified immunity doctrine. See, e.g., Sawyer v. Smith, 110 S. Ct. 2822, 2828 (1990) (recognizing the analogy, citing Anderson v. Creighton, 483 U.S. 635 (1987)); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). As Professors Fallon and Meltzer discuss at length, the similarity is as follows: in the Teague context, the central inquiry is whether the decision of a state court at the time a criminal defendant's conviction became final was a "reasonable, good faith" interpretation of existing law. See,



e.g., Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993) (citing cases). Likewise, in the qualified immunity context, the central inquiry is whether government officials acted in an "objectively reasonable" manner at the time of the alleged constitutional violation in view of the "clearly established law." See, e.g., Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citing cases).[19]

A post-Teague qualified immunity decision by this Court, Siegert v. Gilley, 111 S. Ct. 1789 (1991), supports Petitioner' proposal that federal habeas courts should, as a threshold matter, decide the merits of an issue before addressing the question of whether the claim proposes a "new rule" under Teague. In Siegert, this Court held that "[a] necessary concommitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff asserted a violation of a constitutional right at all." Siegert, 111 S. Ct. at 1793; see also id. at 1795 (Kennedy, J., concurring) (I agree with the Court that '[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the

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[19] Because so many civil rights cases arise in the criminal context, there has been the occurrence of at least one habeas case and one qualified immunity case that have each discussed the same criminal procedure decision of this Court. Compare Butler v. McKellar, 110 S. Ct. 1212, 1220 (1990) (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.) (arguing that Miranda "dictated" the result in Arizona v. Roberson, 486 U.S. 675 (1988), which the majority held was a "new rule" under Teague), with Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir. 1992) (en banc) (in denying qualified immunity, court held: "There is no question that the constitutional holding in Miranda is 'clearly established law' . . . .").

defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.'"). See also O'Conner v. Donaldson, 422 U.S. 563, 573-77 (1975) (finding a constitutional violation and remanding for consideration of immunity defense); Fallon & Meltzer, New Law, supra at 1753 n.111 (collecting modern qualified immunity cases where lower courts addressed the merits of a civil rights plaintiff's claim and then denied relief on qualified immunity grounds).

Because of the strong similarity between this Court's Teague jurisprudence and qualified immunity jurisprudence, this Court should adopt Siegert in the habeas retroactivity context.

**D. Petitioner's First Question Presented is an appropriate vehicle for this Court to modify its Teague doctrine in the manner suggested by Petitioner.**

Petitioner's First Question Presented presents this Court with an opportunity to modify its Teague doctrine as Petitioner has proposed. The claim is clearly one worthy of this Court's attention in view of the considerable division among the lower courts.

As discussed supra, Petitioner not only contends that his claim does not propose a "new rule," but also contends that his claim would alternatively qualify under Teague's exceptions. Whether or not this Court ultimately agrees with Petitioner's arguments on the merits of the substantive issue or Petitioner's argument regarding the application of Teague, this case is an appropriate one in which to adopt Petitioner's proposed modification in this Court's habeas retroactivity doctrine. Thus, this Court should exercise its



discretion to reach the merits of this claim even if it ultimately holds that Petitioner's claim is barred under Teague.

Finally, Petitioner observes that two recent Texas capital cases decided by this Court underscore the need for the modification of Teague that Petitioner proposes. In Graham v. Collins, 113 S. Ct. 892 (1993), this Court, relying on Teague, refused to address the merits of the habeas petitioner's substantive claim because it presented a "new rule." Thereafter, in Johnson v. Texas, 113 S. Ct. 2658 (1993), a direct appeal case in which Teague did not apply, this Court was forced again to grant certiorari and expend a great deal of valuable judicial resources for the sole purpose of addressing the merits of the substantive issue left unresolved in Graham. Had Petitioner's proposed rule been in place a year ago, there would have been no need to have decided Johnson.

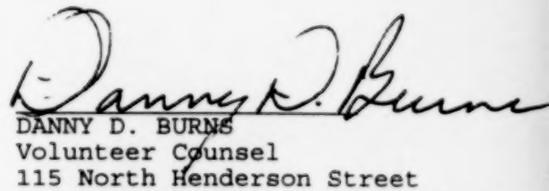
## CONCLUSION AND PRAYER

This Honorable Court should at least grant certiorari in order to determine the propriety of the admission of extraneous offenses in the punishment phase of a capital trial without adequate guiding instructions to the jury on the burden of proof. Until recently (and not at the time of Petitioner's trial), capital defendants were not even apprised of the extraneous offenses which would be used by the State to seek their execution. Because the State need not prove the allegations beyond a reasonable doubt or even by a preponderance of the evidence, the jury is left to consider the evidence as gospel. Without a reasonable doubt instruction, a capital defendant suffers guilt by accusation. The right to notice of the charges against one, the right to be heard in defense of those allegations, and the right to be judged by a proper standard of proof are not "new law" but rather are concepts of fairness which are so embedded in the common law that these rights date back even to biblical times. See *KING JAMES VERSION HOLY BIBLE, Acts 24:13 & 25:7*. Guilt by accusation is the antithesis of due process.



For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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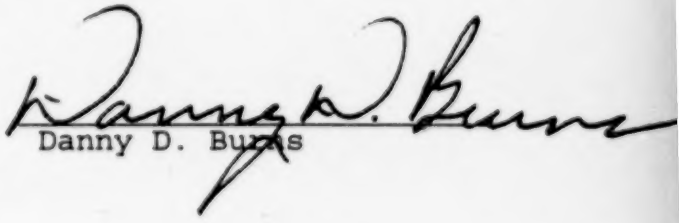
**CERTIFICATE OF SERVICE**

I, Danny D. Burns, a member of the Bar of this Court hereby certify that on this 9th day of February, 1994, a copy of this Reply Brief and Supplemental Questions Presented in the above captioned case were mailed to the Office of the Attorney General, Enforcement Division, P.O. Box 12548, Capitol Station, Austin, Texas, 78701, counsel for respondent herein.



Danny D. Burns